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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 1276

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

ALDRED INVESTMENT TRUST, et al.,

Defendants,

Application of J. N. Welch, R. A. B. Cook and Louis Bernstein for allowance of fees.

Application of George B. Rowlings for allowance of fees.

FRANK BAILEY, et al.,

Intervenors-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND SUPPORTING BRIEF.

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SAMUEL H. KAUFMAN,
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MILTON S. GOULD,
HENRY M. LEEN,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND SUPPORTING BRIEF.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, by Samuel H. Kaufman, their attorney, pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the First Circuit, rendered February 24, 1947. That judgment affirmed in part a judgment of the United States District Court, District of Massachusetts, which, insofar as here material, allowed compensation to Respondents Welch, Cook and

Bernstein in the sum of $75,000, and to Respondent Rowlings in the sum of $14,000, for services rendered by them as attorneys for plaintiff and intervenor, respectively, in the action entitled "*Stratton* v. *Aldred Investment Trust*".

Jurisdiction.

The basis of jurisdiction is Section 240(a) of the Judicial Code.

Summary Statement of Matters Involved.

The Aldred Investment Trust is a Massachusetts Trust, organized in 1927 under an Agreement and Declaration of Trust. It is registered with the Securities and Exchange Commission under Section 8 of the Investment Company Act of 1940 as a "Closed End Management Investment Company". The Trust has outstanding $5,900,000 of 4½% debentures due 1967. To each $1,000 debenture are attached ten shares of common stock without par value. Also outstanding are 112,500 shares of "free" common stock, so that altogether 171,500 shares of common stock are outstanding, 59,000 of which belong to the debentureholders.

In October, 1941, Gordon B. Hanlon acquired 110,000 shares of the free stock of Aldred, constituting control of the Trust; Hanlon became President and certain of his associates were elected other officers and trustees.

On March 8, 1944, a suit was commenced in the United States District Court, District of Massachusetts, by Stratton, a holder of five Aldred debentures, to enjoin Hanlon and the other officers and trustees of Aldred from continuing to act in that capacity, and for the appointment of Receivers (R. 89). Respondent Welch was attorney for plaintiff in that action; respondent Rowlings was attorney for an intervening plaintiff.

On May 19, 1944, before any substantial action had been taken in the *Stratton* case, the Securities and Exchange Commission commenced a proceeding in the same court under the Investment Company Act of 1940, for similar relief (R. 2-11). The District Court held, in the action instituted by the Securities and Exchange Commission, that the officers and trustees had been guilty of misconduct and of a gross abuse of trust and granted the relief prayed for [58 Fed. Supp. 724 (R. 136)]. The judgment was affirmed in the Circuit Court of Appeals, 151 Fed. Supp. 254 (C. C. A. 1st, 1945), and this Court denied certiorari, 326 U. S. 795.

In view of the decision in the action instituted by the Securities and Exchange Commission, the *Stratton* case was dismissed (R. 117, 137).

The District Court allowed petitions of Stratton and Fidelity Assurance Association to intervene in the *Securities and Exchange Commission* case (R. 178, 182). Subsesequently, by an order dated May 13, 1946, the District Court allowed compensation of $75,000 to J. M. Welch, R. A. B. Cook and Louis Bernstein for their services in prosecuting the *Stratton* case (R. 180, 181). By an order dated May 9, 1946, the District Court allowed compensation of $14,000 to George B. Rowlings for his representation of the Receivers of Fidelity Assurance Association, as an intervening debenture-holder in the *Stratton* case (R. 223). The Circuit Court of Appeals has affirmed both awards.

The Question Presented:

May a District Judge, in an equity receivership, make allowance of $89,000 to attorneys for plaintiffs in a collateral case, in the absence of any record or proof of the necessity, extent or value of their services, other than the unsupported statement of said attorneys in oral argument that they and their associate counsel devoted a specified number of hours to the case?

The Reasons Relied on for Allowance of the Writ:

1. While judicial allowances of compensation to attorneys rest in the sound discretion of the Court, that discretion must be exercised according to well-established standards and principles, and upon a reviewable record.

2. The allowance of $75,000 to Respondent Welch and his associates was based upon Welch's oral statement of the number of hours spent by him and his associates, unsupported by any testimony or affidavit as to the nature or extent of the services, or their value. Moreover, his group contributed only incidental assistance to Aldred, the major task of protecting the Trust having been borne by the Securities and Exchange Commission, and any such allowance to him was palpably excessive and improper.

3. The allowance of $14,000 to Respondent Rowlings was predicated upon his oral statement of the number of hours spent by him and his associates, unsupported by any testimony or affidavit as to the nature or extent of the services, or their value. His services were of no benefit to Aldred, and were merely duplicatory of those rendered by the Securities and Exchange Commission and by Respondent Welch. Any allowance to him was improper.

4. In affirming the action of the District Court in making allowances to respondents Welch, Cook, Bernstein and Rowlings, the learned Circuit Court committed error, and reached a conclusion in conflict with decisions of this Court and of other Circuit Courts. That the allowance of counsel fees "rests in the sound discretion of the District Court", and that "considerable latitude must be allowed", are indisputable, but the exercise of "sound discretion" by a court requires a true and discernible connection between the court's award and the services thereby rewarded.

"Latitude" does not include the power to make awards which are not related by an intelligible record to the standards and principles recognized and enunciated by the courts.

5. To permit the District Court to make allowances in equity receiverships without any proof other than the oral assertion of attorneys as to the time spent by them, and to sustain allowances so made, as the learned Court below did here, because of the trial court's "intimate personal knowledge of the services rendered" is to invite and foster abuses in the allowances of fees and to preclude any intelligent review.

ARGUMENT

POINT I.

The only basis for the allowance of $75,000 to Mr. Welch and his associates is Mr. Welch's statement in oral argument that they spent a specified number of hours on the case. This is insufficient; it does not show what services were performed, or the necessity for them, or their value. To permit allowances to stand on such a foundation is virtually to deny the right of review. Moreover, on no reasonable evaluation could the services have justified an allowance of $75,000.

In making the allowance of $75,000 to Mr. Welch, the learned District Judge rendered no opinion (R. 88, 63, 180, 181, 223). The only exposition of Mr. Welch's services which was before the Court was (1) his petition (R. 179-180) which makes no pretense of detailing the services performed, and is completely silent as to the time spent and the value of the services, and (2) Mr. Welch's oral statement, which appears at pages 67 to 75 of the record. The oral statement is as barren as the petition of any description of the actual services rendered.

No time sheets were presented, and no affidavit or testimony was offered as to the nature of the services or their necessity, how long they took, what benefit, if any, resulted to the estate from them, or their value..

The learned Circuit Court rests its affirmance on the trial judge's "intimate personal knowledge" and his "broad discretion".

It must be apparent that if allowances may be based on such considerations, supported by nothing appearing in the record, the party who is required to make the payment is virtually deprived of any opportunity to review the award.

While the amount allowed to an attorney as a fee in an equity receivership, of course, rests in the sound discretion of the Court, that discretion must be "judicially" exercised, according to well-established standards. A court may not base its award on some vague or capricious concept of what may seem fair. It must rely instead on recognized precedents and established rules (see Gerdes, Corporate Reorganization, Vol. III, Chap. 25, and cases cited therein).

The function of the appellate court in reviewing allowances of fees is summarized in *In re Curtis*, 100 Fed. 784, 785-786 (C. C. A. 7th, 1900):

> "So also the amount to be allowed [to an attorney for petitioning creditors in an involuntary bankruptcy proceeding] does not rest in mere discretion. The amount must in all cases be reasonable, to be determined upon evidence of the service performed and of its value, and in the absence of evidence of its value, by the Court from knowledge of its worth. The amount to be allowed rests in legal judgment and judicial discretion, but not in unrestrained discretion, and that judgment and judicial discretion are subject to review. * * * The question is one of delicacy, but the

duty of review may not be put aside. It becomes us, therefore, to inquire with respect to the matter in hand concerning the character and value of the services rendered and of the grounds upon which the allowance was predicated".

The cases in which allowances granted by District Courts have been denied or substantially reduced by this Court and the Circuit Courts furnish a set of criteria against which the propriety of the allowances in the instant case must be tested.

A principle universally acknowledged is the necessity for limiting fees to be allowed out of a fund in court to a "reasonable minimum" (*Palmer* v. *Paramount Pictures, Inc.*, 85 F. (2d) 588, 590, 591 (C. C. A. 2nd, 1936)). This Court has been an especially vigilant guardian against unfairly enriching those who serve the fund at the expense of those who own the fund, and against what Mr. Chief Justice Taft called "vicarious generosity." *In re Gilbert*, 276 U. S. 294, 296 (1928). *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101 (1922); *United States* v. *Equitable Trust Co.*, 283 U. S. 738 (1931); *In re Realty Assoc. Sec. Corp.*, 69 F. (2d) 41 (C. C. A. 2nd, 1934), cert den. *sub nom. Bondholders' Committee, et al.* v. *Realty Assoc. Sec. Corp.*, 292 U. S. 628 (1934).

Attorneys who represent interests in receivership proceedings are not entitled to be compensated according to the standards which would prevail if they were representing the same interests in private litigation. *Callaghan* v. *R. F. C.*, 297 U. S. 464, 468 (1936); *In re Insull Utility Inv. Co.*, 74 F. (2d) 510, 516 (C. C. A. 7th, 1935); *Lincoln Printing Co.* v. *Middle West Utilities Co.*, 17 F. Supp. 799, 801 (N. D. Ill., 1936); *In re Paramount-Publix Corp.*, 12 F. Supp. 823, 828 (S. D. N. Y., 1935).

The most crucial test in determining the amount of allowance is the value of the services rendered in the

creation of the fund. *Louisville, E. & St. L. R. Co.* v. *Wilson*, 138 U. S. 501 (1891); *Milbank, Tweed & Hope* v. *McCue*, 111 F. (2d) 100 (C. C. A. 4th, 1940); *In re National Lock Co.*, 82 F. (2d) 600 (C. C. A. 7th, 1936); *In re Wayne Pump Co.*, 9 F. Supp. 940, 941 (N. D. Ind., 1935); Note, 49 Harvard L. Rev. 1199, 1200, 1203 (1936).

Mr. Welch's contribution consisted principally in instituting for his client the suit which first undertook to obtain a receivership of Aldred. An appraisal of the value of this contribution was made by a representative of the S. E. C., at the hearing on Mr. Welch's application:

> "Mr. Cashion: If your Honor please, in regard to the claims for fees by Mr. Welch, Mr. Cook and Mr. Bernstein, and also Mr. Rowlings, I want to make the statement that we feel that Mr. Welch and his colleagues made a very substantial contribution to the Securities and Exchange Commission case.
>
> That contribution, as we see it, however, consisted of a stipulation of the record of the trial in the *Stratton* case in the record of the Securities and Exchange Commission case. The work of investigation preparatory to the institution of the *Stratton* case I don't think particularly aided the Securities and Exchange Commission case, because the Securities and Exchange Commission had made its own independent investigation, and a very thorough one, and we instituted our action upon the basis of our own independent investigation.
>
> I also want to draw your Honor's attention—and I know that you will consider it—to the fact that the principles of law, or the law, upon which the *Stratton* case was based probably or in fact were different than the law applicable to the *Stratton* [sic] case, because in the *Stratton* case the benefit of the Investment

> Company Act of 1940 was not present. And if in the *Stratton* case, under the principles of law applicable there, the plaintiff might not have succeeded, then I think that should be taken into consideration" (R. 84).

Nor did the *Stratton* case result in any determination by the Court which can be regarded as beneficial to the Trust. The District Court appended to its opinion in *S. E. C.* v. *Aldred Investment Trust, supra*, the following memorandum:

> "In view of the fact that the relief prayed for in this, the *Stratton* case, has been fully granted in the S. E. C. case, it seems unnecessary to pass upon the merits of the *Stratton* case. The bill is therefore ordered dismissed without prejudice and without costs" (R. 137. See also, Judgment of Dismissal, R. 117).

After the S. E. C. had begun its proceedings under Section 36 of the Investment Company Act, the *Stratton* suit had a purely ancillary importance. Lawyers employed by the Commission performed the legal research, made the legal decisions, were charged with the legal responsibility, and accomplished the legal results which were of benefit to the Trust.

In short, although Mr. Welch's group anticipated the action by the S. E. C., their suit was on a theory of law quite different from that which prevailed and there is no finding or adjudication that their suit was well-founded or that they were entitled to prevail. Once the S. E. C. filed its suit, Mr. Welch's group became little more than onlookers.

It is a settled principle that an attorney who, after commencing the action, allows other persons to carry the weight of the litigation, is entitled only to a very limited al-

lowance. In *Commodity Credit Corp.* v. *Bell*, 107 F. (2d) 1001 (C. C. A. 5th, 1939) a receiver was allowed $5,000 and his attorney $2,000. The receivership involved 32,726 bales of cotton stored in warehouses upon which loans had been made aggregating $1,135,000. The Circuit Court of Appeals reduced both allowances by half and said (at pp. 1001, 1002):

> "* * * If we look solely to the figures and consider what would ordinarily be required, the fees in controversy are not unreasonable, but, as stated by the Court below, the litigant lifted all the labor and responsibility out of the hands of the receiver very soon after he was appointed, and left him with nothing to do except to make his report and claim his compensation.
>
> "We do not undervalue the excellent manner in which the receiver handled this matter nor the good advice given him by his attorney upon the few occasions when advice was needed, but the simple fact is that the case was settled before either the receiver or his attorney had earned anything like the amounts which they naturally expected to earn when the work was undertaken."

The analogy to the instant case is apparent. However devoted and valuable were the services Mr. Welch and his associates intended to render, their services were of no value to the estate because their preliminary work—investigation—was not availed of by the S. E. C. (R. 84) and it was the *S. E. C.* suit, and not theirs, which went to adjudication on the merits. Their suit was "dismissed" (R. 117, 137).

As Professor Medill wrote in *Fees and Expenses in Corporate Reorganization Under Section 77 B*, 34 Mich. L. Rev. 331, 338:

> "The working principle is that the services rendered and expenses incurred must be necessary and beneficial".

The reference is to allowances under former Section 77B of the Bankruptcy Act. But, as the author states in the same article (p. 331):

> "Section 77B is no more than a statutory restatement of the principles and practice followed by the courts of equity in administration suits."

Any services performed by Mr. Welch and his associates after the *S. E. C.* suit was filed were not *necessary*. The S. E. C. states unequivocally that Mr. Welch's preliminary work was of no value to it, that the Commission "had made its own independent investigation, and a very thorough one, *and we instituted our action upon the basis of our own independent investigation.*" The case is similar to *Feldblum* v. *Paramount Pictures*, 85 F. (2d) 596 (C. C. A. 2nd, 1936) where the attorney claiming compensation had initiated legal proceedings by filing (on behalf of certain stockholders) an involuntary petition in bankruptcy under Section 77B. This was contested by the Company. Subsequently the Company filed a voluntary petition, which the trial Court ordered would not prejudice the rights established by the petitioning attorney in the involuntary proceeding. The Court wrote:

> "It does not appear that any transfer was avoidable under the involuntary proceeding that would not have been voidable under the voluntary one. In view of the situation we hold that he was entitled to compensation for his services as attorney for the petitioning creditors and that $500 is a reasonable amount" (p. 597).

In the instant case, Welch accomplished nothing for the benefit of the Trust. After the *S. E. C.* proceeding was undertaken, any services Welch performed were unnecessary and mere duplication, for which he may not be rewarded out of the fund in the hands of the Court, no matter how well-intentioned his services may have been. *In re New York Investors*, 79 F. (2d) 182 (C. C. A. 2nd, 1935); *Davis* v. *Seneca Falls Mfg. Co.*, 17 F. (2d) 546 (C. C. A. 2nd, 1927); *Weed* v. *Central of Georgia Ry. Co.*, 100 Fed. 162 (C. C. A. 5th, 1900). (See Point II.)

The applicable rule is similar to that which requires attorneys representing creditors or stockholders, after the appointment of a receiver, to look for compensation to their own clients, rather than to the estate. *In re Eureka Upholstering Co.*, 48 F. (2d) 95 (C. C. A. 2nd, 1931); *In re New York Investors*, 79 F. (2d) 179 (C. C. A. 2nd, 1935), *cert. den. sub nom. Endelman* v. *R. F. C.*, 296 U. S. 649 (1935); *In re Realty Assoc. Sec. Corp.*, 69 F. (2d) 41 (C. C. A. 2nd, 1934), *cert. den. sub nom. Bondholder's Committee* v. *Realty Assoc. Sec. Corp.*, 292 U. S. 628 (1934). This follows because the estate is ordinarily represented by a receiver or trustee whose duty it is to take all steps necessary to protect it; and only when he neglects his duty, and a suit by others is necessary in order to recover assets or prevent waste, will compensation or recoupment of expenses be awarded as though proceedings had been at his instance. *Palmer* v. *Paramount Pictures, Inc.*, 85 F. (2d) 588 (C. C. A. 2nd, 1936); *United States* v. *Equitable Trust Co.*, 283 U. S. 738 (1931); *Trustees* v. *Greenough*, 105 U. S. 527 (1882).

As in those cases, any creditor or stockholder has a right to be heard. But the prime necessity for preserving the assets of the estate requires that attorneys for these creditors and stockholders be denied compensation out of the estate. The Commission here stands in the position

relative to Mr. Welch's group that a receiver does at a later stage in the proceeding to a petitioning creditor. After initiating its suit, the Commission became the representative of all groups.

Mr. Welch's allowance, therefore, must be limited to the value of his services in commencing the *Stratton* suit. But an allowance of $75,000 is permissible in only the rarest kind of receivership, to which an attorney makes a contribution of heroic stature. "The highest compensation ever approved by the Interstate Commerce Commission and the courts for trustees of railroads who devote their entire time to the duties of that position is $36,000 per annum, and the compensation for their attorneys has been placed on a correspondingly moderate basis." See *Lincoln Printing Co.* v. *Middle West Utilities Co.*, 17 F. Supp. 799, 801 (N. D. Ill., 1936).

Trustees Corp. v. *Kansas City M. & O. Ry. Co.*, 26 F. (2d) 876 (C. C. A. 8th, 1928), involved allowances for a receiver and his attorney whose services had been of the highest value. They had devoted all their efforts to the task over a long period of time, and, in the language of the Court, had "pulled the road out of the mire". Even in these circumstances the court felt compelled to halve the allowance ordered by the lower court; the receiver was awarded $40,000 per year and his attorney $35,000. This case is but one of many which serve to point out that fees such as that allowed Mr. Welch and his associates are permitted only in most extraordinary cases and then only to those whose services benefitted the fund enormously. See cases collected in 143 A. L. R. 772-780.

In his oral argument in the District Court, Mr. Welch compared himself with attorneys who bring suits on behalf of minority stockholders and recover for the corporation large sums of money which would otherwise have been lost to it; he emphasized that such attorneys are richly

rewarded for the benefit which their efforts bring to the corporation (R. 69-71). But Mr. Welch performed no such service here; he recovered nothing for the Trust. Aldred is solvent today, where it was insolvent before, for the sole reason that the market value of the securities it holds has greatly increased and because the value of a single asset, Eastern Racing Association, has trebled (R. 147, 148). This was the result of generally improved business conditions and the enhancement in the value of the Eastern Racing Association stock; it had nothing to do with the legal proceedings involved. The sole beneficial result of the legal proceedings was the ousting of irresponsible management, and this was accomplished by the *S. E. C.* case, not the *Stratton* action.

Smith v. *Central Trust Co.*, 139 F. (2d) 733 (C. C. A. 4th, 1944) was similar to the instant case in that the value of the debtor's estate increased during the pendency of the proceedings solely by reason of a rise in the market price of the securities it owned (see footnote 3, p. 738). There, allowances were sought by the trustee and his attorneys under Chapter X of the Bankruptcy Act. The petition for reorganization had been dismissed because the interests of creditors, it was held, would best be served in a state court proceeding. Notwithstanding conscientious service to the debtor over a continuous period of two years, the Court said (at p. 738):

> "• • • it is obvious that the failure of the reorganization and the dismissal of the proceedings are facts which should be considered in fixing the amount of the compensation, for the outlay must be made at the expense of the creditors who will have received no benefit from the efforts put forth, no matter how well intentioned they may have been. In our view insufficient weight has been given to these considerations in the present case; • • •"

The Court ordered the trustee's allowance reduced to $25,000 and that of his attorneys to $20,000 (p. 739), despite the increase in the company's assets and despite the fact that the attorneys had been obliged to contest the suit in appeals before the Circuit Court of Appeals and the United States Supreme Court.

On what basis, then, did Mr. Welch's services entitle him and his associates to an allowance of $75,000? He cannot claim that his services created a fund, or even preserved a fund.

Mr. Welch presented no "time sheets" of any kind to establish the number of hours necessarily spent in the service of Aldred, although it is the general practice to follow the procedure prescribed by the Bankruptcy Act and submit verified and itemized statements with sworn affidavits. Courts have consistently drawn unfavorable inferences from such general estimates and have either reduced the allowances or remanded the case with instructions to obtain a detailed record. See Medill, *Fees and Expenses in Corporate Reorganization Under Section 77 B*, 34 Mich. L. Rev. 331, 332, and cases there cited: *Elsesser* v. *Pfleging*, 254 App. Div. 753 (N. Y., 1938); *Kephart* v. *Horvath*, 263 Mich. 211, 248 N. W. 598 (1933); *Dykman* v. *New York*, 183 App. Div. 859 N. Y. 1918); *City Nat. Bank & T. Co. of Chicago* v. *Sewell*, 300 Ill. App. 582, 21 N. E. (2d) 810 (1939).

Mr. Welch states that he and his associates spent 2100 hours on matters related to Aldred. That statement, since it is undocumented and is unsupported by any written records, can, at best, be only a guess. However, even that figure, if accepted, would not support the allowance made, on the basis of comparison with fees allowed in other cases. *In re Allied Owners*, 79 F. (2d) 187 (C. C. A. 2nd, 1935); aff'd *sub nom. Callaghan* v. *R. F. C.*, 297 U. S. 464 (1936) required the Circuit Court to pass on the propriety

of a fee of $75,000 to attorneys for the trustees in bankruptcy. The Court wrote:

> " • • • These and many other important matters, such as litigation over the Ringling note, requiring skill and experience, are said to have occupied one or more of the partners in Goldwater & Flynn and two of their legal assistants for some 4,508 hours, of which 3,023 were those of their assistants. Many of the things done by these lawyers, as is always the case, were routine matters; many were matters of large importance; many were of a sort preliminary to the reorganization, which has not yet been completed. We think $50,000 is a reasonable compensation for these attorneys, and we award that amount, instead of $75,000, to which is to be added their disbursements of $1,247.80 directed to be paid by the District Judge" (p. 191).

As Judge Swan said in *Franklin* v. *City of New York*, 144 F. (2d) 571, 574 (C. C. A. 2nd, 1944):

> "In appraising the value of an attorney's services in a receivership proceeding benefit to the estate and accomplishment rather than effort or time consumed supply the measuring yardstick".

There is nothing in this record to show the services performed, or that they were necessary, or in what way they benefited the estate, or their value. There is only Mr. Welch's oral approximation in the course of argument of the time spent by him and his associates on matters relating to the case. This, we submit, was insufficient; it not only furnished no basis for evaluation of the services by the District Judge, but it makes any intelligent review of his decision utterly impossible. To permit substantial

allowances to stand on such a foundation is virtually to deny the right of appeal, and this result is in no way altered by the statement of the Trial Judge that he is personally familiar with the services performed.

In any event, the allowance of $75,000 for services which consisted only in initiating the *Stratton* suit (which was of no value in enhancing the estate) was obviously an abuse of discretion. It should have been drastically reduced by the Circuit Court.

POINT II.

The allowance of $14,000 to Mr. Rowlings is based on his oral statement of the number of hours spent on the case. It is erroneous for the same reasons as those discussed with respect to the allowance to Mr. Welch and his associates. Moreover any services performed by Mr. Rowlings merely duplicated those of Mr. Welch and the S. E. C. His claim should have been disallowed in toto.

The only record before the District Court of Mr. Rowlings' services was (1) the brief Petition for allowance (R. 221), and (2) the oral exposition which appears at pages 75 to 78 of the record. As in the case of the allowance to Mr. Welch, the District Court did not require the filing of a petition such as is required under Sections 62(a) and 249 of the Bankruptcy Act. The Petition filed is a sketchy, formal document containing no description of services, no analysis of their importance or value. It is no more than a notice that an application is being made. The oral statement is equally barren of any basis upon which a Court can make any understandable evaluation of Mr. Rowlings' services. The affirmance of the allowance to Mr. Rowlings was erroneous not only because it was unsupported by a proper record, but because it violates the recognized doctrine respecting duplication of services.

One of the fundamental rules governing allowances to attorneys in receivership or bankruptcy proceedings is that attorneys representing persons whose interests are already represented by others are not entitled to compensation from the estate. This is a necessary corollary of the principle that allowances may be made only to those whose services were necessary to the estate. (See Point I.)

The services rendered by Mr. Rowlings were in behalf of receivers for Fidelity Assurance Association (R. 223), holders of debentures issued by Aldred. The interests of these debenture-holders were represented throughout by the Securities & Exchange Commission, just as Stratton's interests were so represented. All that is said in Point I, with reference to the allowance to Mr. Welch applies, therefore, *a fortiori*, to the allowance to Mr. Rowlings.

But in addition to being represented by the Commission, these debenture-holders were represented by Welch, whose client was a debenture-holder of the identical class. The District Court so found (R. 237).

The District Court, two years before it rewarded Mr. Rowlings so generously for his "services", expressed the opinion that "the intervention of this petitioner would add nothing to this issue and might complicate it." (Court's Memorandum, March 23, 1944, denying the motion by Receivers of Fidelity Assurance Association to intervene in the *Stratton* case, R. 229.) Mr. Rowlings' clients again pressed for intervention following this Memorandum. In their application to the court they stated:

> "Unquestionably the claim of these interveners is in subordination to and entirely in recognition of the original proceedings. *No new claims are asserted by them. They support precisely the allegations of the plaintiff and seek the same relief, no more and no less*" (R. 235). (Italics supplied.)

They recognized further that "*the issues will be precisely the same as if the intervention had not been asked*" (R. 236). On the basis of the acknowledgment by Mr. Rowlings' clients that they were to be mere bystanders in the case, ready to take over only if Mr. Welch and his associates should abandon the proceeding (R. 234), the District Court finally allowed their petition to intervene in the *Stratton* case. The learned District Judge wrote (R. 239):

> "The Court is of the opinion that the claims of these petitioners have a common question of law or fact with the original plaintiff and that these interventions will not unduly delay the hearing on the merits."

He allowed their petition to intervene "without prejudice to the adjudication of the rights of the original parties". (Court's Memorandum, May 24, 1944 allowing petition to intervene, R. 237.)

In a case involving mere parallel representation the authorities are unanimous in denying any compensation from the estate. There are at least two valid reasons for the rule: (1) the necessity of preserving the assets of the estate; (2) the fact that one who intervenes, despite the efforts of persons already representing his interests, does so for his own benefit rather than the benefit of the estate. It is the basis of the provision in the Bankruptcy Act which permits only "one reasonable attorney's fee" [Sec. 64 (a) (1), 11 U. S. C. A. Sec. 104 (a) (1)], which does no more than codify the practice in equity receivership proceedings. Medill, *Fees and Expenses in Corporate Reorganizations Under Section 77 B*, 34 Mich. L. Rev. 331, 368.

The rule is of general application. It denies all compensation where services are being competently performed by the attorney for a receiver or trustee. *Clark* v. *Goodman*, 124 F. (2d) 491 (C. C. A. 2nd, 1941); *Davis* v. *Seneca Falls*

Mfg. Co., 17 F. (2d) 546 (C. C. A. 2nd, 1927); Medill, *supra*, p. 358, and cases there cited. Similarly, it denies compensation or reimbursement of expenses to a creditor when another creditor of the same class has already intervened. *In re Diamond Fuel Co.*, 6 F. (2d) 773 (C. C. A. 2nd, 1925); *In re Porto Rican American Tobacco Co.*, 117 F. (2d) 599 (C. C. A. 2nd, 1941). As the Court said in *Nolte* v. *Hudson Nav. Co.*, 47 F. (2d) 166, 168 (C. C. A. 2nd, 1931):

> "The theory on which the expenses as well as the benefits are to be shared rests on the assumption that those who act represent the others, *Lamar* v. *Hall & Wimberly* (C. C. A.) 129 F. 79, and so, where creditors are represented by counsel of their own choice, who do in fact act for them, they cannot be compelled to share in the expenses incurred by the employment of other counsel by other creditors, *Fletcher* v. *Coomes, et al.*, 20 App. D. C. 159, 285 F. 893."

In *In re Paramount Publix Corp.*, 85 F. (2d) 588 (C. C. A. 2nd, 1936), *cert. den.* 300 U. S. 655 (1937), an attorney who had represented stockholders and creditors sought compensation for various services allegedly rendered to the debtor, among them a reduction in the rate of interest on money borrowed from banks. In denying the right to an allowanee, the Court said (at p. 590):

> "Before appellant could properly claim an allowance out of the general estate, he ought to have satisfied the court that the stockholders * * * or the creditors * * * for whom he appeared, needed as members of a class further representation in connection with the reorganization than that already available to them. * * * This he failed to do.
>
> * * * * *

> "Under all the circumstances compensation should be allowed only where services are reasonably required, whether those rendering them be committees or individuals. *In re A. Herz, Inc.*, 81 F. (2d) 511 (C. C. A. 7th, 1936)".

Mr. Rowlings has made no attempt to show that the interveners he acted for required representation in addition to that afforded them by Mr. Welch and the Commission. The fact that Rowlings may have contributed advise is wholly irrelevant (R. 75, 78). In *Warren* v. *Palmer*, 132 F. (2d) 665 (C. C. A. 2nd, 1942), the Court said (at p. 669):

> "Petitioners also assert that they were required to keep in constant touch with the various plans proposed because of their interest and claim reimbursement for those activities. But this court has declared that 'mere participation in the hearings, * * * or offering advice, suggestions, or criticisms regarding the proposed plan, or on matters of procedure, does not give rise to any claim for compensation from the estate. In re Paramount Public Corp., supra, 85 F. (2d) at page 591. See also Milbank, Tweed & Hope v. McCue, 4 Cir., 111 F. (2d) 100, 101.' "

See also *Barker* v. *Southern Bldg. & Loan Ass'n*, 181 Fed. 636 (N. D. Ala., 1910); *In re McMillan Rapp & Co.*, 36 F. Supp. 663 (E. D. Pa., 1941), holding that incidental assistance, however valuable and well intended, may not be made the basis for an allowance from the estate.

Under settled authority, there is no basis for compensation in any amount to Mr. Rowlings. If his services were of value to Mr. Welch, whose efforts he admittedly duplicated, he should look to Mr. Welch and his associates for compensation.

CONCLUSION.

Any attempt to review allowances to Counsel upon the record afforded by the respective petitions of Welch and Rowlings, implemented by their oral statements, is necessarily futile. Awards based upon such records are immune from that scrutiny by appellate Courts which affords the only safeguard against carelessness, caprice and unjustified liberality.

The petition for certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 1276.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
against
ALDRED INVESTMENT TRUST ET AL.,
Defendants.

APPLICATION OF J. N. WELCH, R. A. B. COOK AND LOUIS BERNSTEIN FOR ALLOWANCE OF FEES,
Respondents.

APPLICATION OF GEORGE B. ROWLINGS FOR ALLOWANCE OF FEES,
Respondent.

FRANK BAILEY ET AL.,
Intervenors-Petitioners.

BRIEF FOR RESPONDENTS J. N. WELCH, R. A. B. COOK AND LOUIS BERNSTEIN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is submitted in behalf of the respondents J. N. Welch, R. A. B. Cook and Louis Bernstein in opposition to the petition for writ of certiorari filed herein by

Frank Bailey *et al.* in so far as it seeks a review in this Court of the allowance of $75,000 for counsel fees and expenses awarded to the respondents by the United States District Court for the District of Massachusetts, and unanimously affirmed by the United States Circuit Court of Appeals for the First Circuit.

Opinions Below.

The District Judge rendered an oral opinion on May 8, 1946 (R. 88), awarding this allowance to the respondents.

The Circuit Court of Appeals for the First Circuit filed a written opinion on February 24, 1947, affirming the aforesaid award to the respondents (R. 242).

Jurisdiction.

Petitioners apply for a writ of certiorari to review the award of compensation to the respondents under Section 240(a) of the Judicial Code.

The respondents respectfully submit that no question of law is presented on the petition to this Court, the allowance having been made to the respondents by the District Court in the exercise of its discretion and the Circuit Court of Appeals having affirmed such exercise of discretion and held that there was no abuse of discretion on the part of the District Court, and accordingly this Court should dismiss or deny the petition for a writ of certiorari herein to review the aforesaid judgment of the Circuit Court.

Facts.

On October 1, 1941, Gordon B. Hanlon bought at public auction 110,000 common shares of the Aldred Investment

Trust. That purchase gave him voting control of the Trust, with power to elect and remove trustees and officers, to fix the compensation of the latter and to dominate its policies (R. 4). In February, 1944, the Trustees of Aldred Investment Trust, then dominated by Hanlon, purchased the majority of the outstanding shares of the Eastern Racing Association.

On March 8, 1944, a complaint was filed in the District Court by respondents Cook and Bernstein as counsel for Charles F. Stratton, owner of certain debentures and shares, against Aldred Investment Trust and its trustees and officers, charging that the Trust was hopelessly insolvent; that there was gross and wanton waste in the management of the business and affairs of the Trust and gross and wanton abuse of trust on the part of the officers and trustees. The complainant prayed for the appointment of a receiver to take over the assets and liquidate the Trust, and for an injunction to restrain the officers and trustees from interfering with the receiver in the management and direction of the affairs of the Trust (R. 97).

An answer was filed on April 25, 1944, denying any such mismanagement and abuse of trust, and alleging that the complainant was entitled neither to the appointment of a receiver nor to the liquidation of the Trust (R. 98). Depositions were taken on June 1, 2 and 6, 1944, and the trial on the merits took place on June 8, 9, 15, 16 and 20, 1944. The testimony taken in the Stratton case, exclusive of exhibits, covers approximately 385 printed pages.

At the conclusion of the trial of the Stratton case, decision was reserved by the District Court until after the trial of a similar suit, filed on May 19, 1944, by the Securities and Exchange Commission against Aldred Investment Trust and its trustees and officers.

The S.E.C. case was tried on January 2, 3 and 4, 1945. At that trial, under a stipulation entered into by the par-

ties, all the testimony, depositions and exhibits received in evidence in the Stratton case were incorporated into and added to the testimony presented in the S.E.C. case.

After the trial of the S.E.C. case, the District Court found the officers and trustees guilty of misconduct and gross abuse of trust, and appointed receivers with power either to reorganize or to liquidate the Trust (58 Fed. Sup. 724). In the light of such determination, the District Court found it unnecessary to pass upon the merits of the Stratton case because it stated that the relief prayed for in that case had been fully granted in the S.E.C. case.

Upon appeal by the defendants in the S.E.C. case, the respondents herein filed a brief *amici curiae* in support of the judgment of the District Court. The Circuit Court of Appeals for the First Circuit affirmed the judgment of the District Court (151 F. 2d, 254).* A petition for writ of certiorari was denied by this Court (326 U.S. 795).

Although the Trust was hopelessly insolvent at the time this litigation began, the assets have risen in value so that it now has cash and securities of a market value of $8,590,-750, or $2,690,750 in excess of the aggregate par value of $5,900,000 of the outstanding debentures of the Trust (R. 141). As a result of such increase in value, debenture holders will receive not only the full face amount of their debentures, but also a substantial payment on account of their shares of beneficial interest.

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*In footnote 2 at page 255 of its opinion, the Circuit Court of Appeals said:

> "In a companion proceeding brought by Charles F. Stratton, a holder of Aldred Trust debentures, on behalf of himself and the other security holders, seeking the appointment of receivers and the liquidation of the Trust, the court below found it unnecessary to pass on the merits of the case since the relief sought was fully granted in the S.E.C. proceeding and dismissed the bill without prejudice. All the evidence in the Stratton case, which was tried first, was incorporated by reference in the instant case."

The petitioners first became interested in this situation when they purchased Mr. Hanlon's shares in the Aldred Investment Trust, shortly before this Court denied certiorari in 1946.

Subsequently, the District Court allowed a petition by Stratton, the plaintiff in *Stratton* v. *Aldred Investment Trust et al.*, to intervene in the proceedings of the S.E.C. case and to file a petition for allowance of reasonable compensation to counsel for Stratton for services rendered and disbursements incurred.

At the Court hearing on allowances, Mr. Welch stated that his associates began work in this matter in 1942, and sometime later he became associated with them, and that the combined time of himself and his associates spent on this work approximated 2100 hours (R. 74). At this hearing, counsel for the Securities and Exchange Commission agreed that Mr. Welch and his colleagues were entitled to compensation, and that the amount was discretionary with the Court (R. 85). The two attorneys for the Securities and Exchange Commission stated:

> "Mr. Kelly: • • •
>
> "At the outset, if the court please, in order to make the position of the Commission clear, we recognize that the allowance of any fees and the amount of any fees that would be allowed is a matter within the sound judicial discretion of your Honor." (R. 82.)
>
> "Mr. Cashion: If your Honor please, in regard to the claims for fees by Mr. Welch, Mr. Cook and Mr. Bernstein, and also Mr. Rowlings, I want to make the statement that we feel that Mr. Welch and his colleagues made a very substantial contribution to the Securities and Exchange Commission case." (R. 84.)

• • • • • • •

"The Court: You don't care to translate any of that into dollars and cents?

"Mr. Cashion: No, that is within your Honor's discretion, as Mr. Kelly said." (R. 85.)

At this hearing, counsel for the petitioners herein recognized the right of respondents to receive reasonable compensation for their services, stating:

"Mr. Kaufman: If your Honor please, we recognize very well that Mr. Welch is entitled to compensation for services rendered." (R. 85.)

* * * * * * *

"So I don't think that is any basis for any determination by the court, other than the fair and reasonable value of the services necessarily rendered by Mr. Welch and his associates in connection with this litigation." (R. 86.)

The petitioners accordingly did not deny in the District Court, and indeed do not deny on their present petition to this Court, that the respondents were entitled to compensation for "the fair and reasonable value of the services" (R. 86).

The District Court rendered an oral decision on the application for allowance, stating:

"The Court: Well, I feel that I am as adequately prepared to make the allowance today as I would be at any other time, as I have thought these petitions over. On the Welch petition, I am going to allow $75,000." (R. 88.)

On the appeal therefrom to the Circuit Court of Appeals, the petitioners herein contended that the compensation

awarded to the respondents was in excess of the value of the services they performed and should be reduced (R. 245). The Securities and Exchange Commission filed a brief with the Circuit Court of Appeals, stating at page 1 the following:

> "During the hearing on allowances in the District Court, * * * The question of allowances to the other attorneys [the respondents herein] was discussed generally and without specific recommendation by the Commission representatives, and we take no position on these allowances on the present appeal."

The Circuit Court of Appeals, which was fully familiar with all of the facts and circumstances of the situation, because of the prior appeal considered and determined by it, characterized the services of respondents and of counsel for intervenors as follows:

> "The Trust was merely a nominal defendant and the purposes of the suits brought by Stratton and by the S.E.C. were to protect its assets from the manipulations of the officers and trustees, who were charged with gross misconduct and gross abuse of trust, and, by the appointment of receivers and the issuance of an injunction, to remove the corpus of the Trust from any further abuse and place it in the hands of persons who would work for its security and protection. * * * The Trust was insolvent and Hanlon and his associates were interested in continuing control for their own benefit and not for the benefit of the Trust." (R. 246.)

> "In the proceedings which resulted in the appointment of receivers, the complainants sought to rescue the Trust from waste and destruction arising from the

neglect or misconduct of the officers and trustees. The record in the *Stratton* case and the efforts of Mr. Welch and his colleagues greatly aided in the successful prosecution of the Commission's case, both in the District Court and in this court. Mr. Rowlings and Mr. Palmer of Koontz & Koontz participated in the preparation and trial of the *Stratton* case and their efforts too were of great assistance in the preservation and protection of the corpus of the Trust. They also presented a brief as *amici curiae* in the Circuit Court." (R. 245.)

Extraordinary benefits have accrued to the holders of Aldred Investment Trust securities as a result of these proceedings. Not only has the Trust been freed from the domination of faithless trustees, but the liquidation of the Trust will be effected at a moment when the Trust has achieved its peak of solvency, a condition which otherwise might well have been transitory (R. 215).

The assets of the Trust have been brought into court and the debenture holders have been liberated from a situation where they were "helpless under the terms of the debenture agreement to halt the dissipation of their assets * * *" and where they "could not expect relief either by way of *bona fide* recapitalization or liquidation" (R. 133).

As above indicated, debenture holders will now receive, not only the full face amount of their debentures, but also a substantial payment as a liquidating dividend on their shares of beneficial interest.

The tribunal best qualified to appraise the value of the services of the respondents was the District Court. Necessarily implicit in its order granting compensation to the respondents must have been the finding that their services in fact contributed greatly to the final result. The value

of the services of the respondents has also been acknowledged and affirmed by the Circuit Court of Appeals, as above noted. In view of the extent and nature of the services of the respondents, the importance of the issues involved, the extraordinarily successful results, the time spent, and the fact that the District Court had full opportunity personally to observe and appraise the value of the services, the award by the District Court was clearly in the exercise of its sound discretion.

Petitioners' Claims.

Petitioners assert (p. 5) that the record "does not show what services were performed, or the necessity for them, or their value." This assertion is clearly in error. The services performed are fully set forth by Mr. Welch at pages 65 to 75 of the record. We cull from Mr. Welch's statement the following highlights of the services performed:

> "Mr. Bernstein of the New York Bar and Mr. Cook were called into this case in February of 1942. That was shortly after Mr. Hanlon had secured control of the Aldred Investment Trust." (R. 66.)
>
> "They first considered, quite aside from what later developed in respect to the race track, what means there were at their disposal to wrest this Trust from Hanlon and his associates, because with great clarity of vision they saw that there was trouble ahead if he were in there. They first, as I have indicated, considered whether or not they could have bankruptcy. They made a careful study of the whole thing and they concluded that that route was fraught with grave difficulties." (R. 66-67.)

"Then another time came that the purchase of the racetrack came to their attention, and they decided that every fear they had entertained about the Trust was now materializing and that there was but one course open, not bankruptcy, but the suit that was here brought on behalf of Mr. Stratton.

"I would like to say to your Honor that that was an important and a grave decision on their part. They were men wise enough to see enormous difficulties. They could see, for example, that Hanlon would engage the most eminent counsel at his command at the Boston Bar to fight them. They could foresee that there would be every possible appeal if there were success in the lower court. They could look with some alarm at the war chest, which was the fund itself, which so far as they knew could be expended and would be expended in fighting them." (R. 67.)

"It was not until those years of work by Mr. Cook and Mr. Bernstein had been spent on this case—and by no means all of those years but portions of their time through those years—that I was called into the case." (R. 68.)

"• • • I found • • • a complicated matter indeed, with heavy preparation necessary. A good deal of it had been done by Mr. Cook and Mr. Bernstein, but it was necessary to go through the voluminous mass of papers which included every record we could get hold of, of the Trust itself and of the Racing Association, applications to the S.E.C. to reorganize, the taking of depositions of all these reluctant trustees and prying out of them such information as we could. And time certainly was poured into the case in preparation before it came before your Honor for trial.

"As to the trial, I shall certainly say nothing. Your Honor heard every word of it. You have either a good opinion, a mediocre opinion or a bad opinion of what was done.

"After the trial, we of course followed the litigation, as your Honor is aware. We did not, however, argue in the Circuit Court of Appeals, but we did prepare a brief amicus, which was filed. * * *" (R. 68.)

"And once again, yesterday I looked at that brief with some satisfaction as I saw many of those arguments reflected in the court's opinion." (R. 69.)

"Let it not be said, either, that all the winning that the bondholders have had has been granted to them by a bull market and by the craze for racing. I am not contending that the bull market and the craze for racing has not been an enormous advantage to them. Let this never be forgotten, that this litigation allowed them to capture that at what I conceive to be its peak. And if Mr. Hanlon were in control of this situation today, they could look with all the pleasure they could muster at their pieces of paper and they could wait until the inevitable bear market comes and the inevitable slump in racing, or the State legislating it out of existence." (R. 72.)

"I thought it was proper for me to state to your Honor the number of hours spent on the case. Mr. Bernstein in New York, from the time he came into the case up until yesterday, and not including his being here today, spent just about 1000 hours. Mr. Cook spent just about 800 hours. With a slight blush on my face I can only claim for myself and my partners about 300 hours. The explanation is, however, that they

were in the case so much longer than I was and had done so much in preparation before I came into it." (R. 74.)

"It is with some embarrassment that I say to your Honor that there is not perfect unanimity among my group as to what would be a fair fee. To some extent I am stating figures distinctly less than one of us thinks, perhaps less than two of us thinks. It is my opinion that a fair fee would be $125,000." (R. 78.)

The record is complete with respect to the services performed, the necessity for them, and their value. Finally, as stated in the affirming opinion of the Circuit Court of Appeals, the District Court "had intimate, personal knowledge of the services rendered." (R. 245.)

Each of the respondents was present in court at the fee hearing (R. 64, 74) and was available for examination by petitioners' counsel, but he elected not to examine any of the respondents, nor did he at that time raise any objection to the form of the petition for allowance or the proceedings thereon, which he now raises for the first time in this Court.

Petitioners' final claim is that the services "consisted only in initiating the *Stratton* suit" (p. 17) and could not "have justified an allowance of $75,000" (p. 5). The petitioners throughout their petition assert that the only services rendered by the respondents consisted in initiating the Stratton suit. This assertion is clearly erroneous. The respondents took voluminous depositions in the Stratton case, made thorough investigations of all the facts, prepared the case fully for trial and engaged in an extended trial of the case before the District Court (R. 68). After such trial, all of the testimony, depositions and exhibits in that case were incorporated into and added to

the testimony in the S.E.C. case. After the decision by the District Court, the respondents participated in the appeal to the Circuit Court of Appeals to the extent of filing a brief *amici curiae,* seeking affirmance of the judgment of the District Court (R. 68).

A comparison of the record of the proceedings in the Stratton case and the S.E.C. case indicates that the issues on which the S.E.C. case was decided were fully developed in the Stratton case, and that the additional evidence offered in the S.E.C. case was either of minor importance or merely an elaboration of testimony in the Stratton case.

The extent to which the work of respondents was reflected in the actual decision of the District Court is clearly brought out by a comparison of the allegations in the Stratton complaint with the findings of the Court in the S.E.C. case. The appendix hereto annexed shows a decided parallelism between a major portion of the Court's opinion and the allegations of the Stratton complaint, and it is believed demonstrates a relationship of cause and effect between the services of respondents and the judgment that was entered.

S.E.C. frankly stated that "we feel that Mr. Welch and his colleagues made a very substantial contribution to the Securities and Exchange Commission case" (R. 84, 85). While counsel for the Commission also stated that the S.E.C. suit was instituted on the basis of its own investigation, he made it clear that the successful trial of the S.E.C. case was greatly aided by the efforts of counsel in the Stratton case.

The affirming decision of the Circuit Court clearly recognizes the value of the services of the respondents and the justification for the award to them. The Circuit Court said:

> "In the proceedings which resulted in the appointment of receivers, the complainants sought to rescue

the Trust from waste and destruction arising from the neglect or misconduct of the officers and trustees." (R. 245.)

"At the conclusion of the trial [of the Stratton case], which was held in June, 1944, decision was reserved until the case of the *Securities and Exchange Commission* v. *Aldred Investment Trust et al.*, which had been filed on May 19, 1944, was tried. Under a stipulation entered into by the parties all the testimony, depositions and exhibits in the *Stratton* case were incorporated into and added to the testimony in the S.E.C. case * * *" (R. 243.)

"The record in the *Stratton* case and the efforts of Mr. Welch and his colleagues greatly aided in the successful prosecution of the Commission's case, both in the District Court and in this court." (R. 245.)

The Circuit Court of Appeals emphasizes the fact that the efforts of the respondents "were of great assistance in the preservation and protection of the corpus of the Trust" (R. 245).

Question Presented.

Should this Court review a judgment of the Circuit Court of Appeals for the First Circuit affirming an award of compensation made to the respondents by the District Court in the exercise of discretion, where no abuse of discretion is shown, and the only question that this Court would be called upon to determine is the reasonableness of the compensation awarded to the respondents for professional services rendered in bringing the assets and property of Aldred Investment Trust valued at about $8,500,000,

under the jurisdiction of the District Court, and into the possession of a receiver appointed by that Court for the purpose of liquidation of the Trust and distribution of the proceeds thereof to the security holders?

Point I.

The Case does Not Involve Any Question of Law which Requires a Determination by This Court.

As above indicated, the decision of the District Court awarding an allowance to the respondents rested in the discretion of the Court. On appeal to the Circuit Court of Appeals, no abuse of discretion was shown. To the contrary, it was clear that the District Court had duly exercised its sound discretion in granting the award of compensation to the respondents.

The Circuit Court of Appeals for the First Circuit affirmed the allowance to the respondents, and this affirmance does not present any reviewable question in this Court. This is manifest from the following quotation from the decision of the Circuit Court of Appeals (R. 245):

> "The allowance of the above fees rests in the sound discretion of the district court and considerable latitude should be allowed. *May* v. *Midwest Refining Co.*, 121 F. (2d) 431 (C.C.A. 1st, 1941), cert. denied 314 U.S. 668 (1941) citing *Trustees* v. *Greenough*, 105 U.S. 527, 537. See also *Colley* v. *Woolcott*, 187 Fed. 595 (C.C.A. 8th, 1911); Hornstein, *The Counsel Fees in Stockholder's and Derivative Suits* (1939), 39 Columbia Law Review 784. Where the trial judge has personal knowledge of the various proceedings in the litigation and a thorough understanding of the character of the services rendered, he should have a broad discretion in such matters. *Gochenour* v. *Cleveland Ter-*

minal Bldg. Co., 142 F. (2d) 991, 995 (C.C.A. 6th, 1944), cert. denied 323 U.S. 767 (1944). After reviewing the record and considering the objections made to these allowances, we are unable to say that they are excessive or unreasonable, or that the trial judge, who had intimate, personal knowledge of the services rendered, abused his discretion in making them."

The above decision of the Circuit Court of Appeals affirming the exercise of discretion of the District Court does not involve any question of law that may be determined by this Court.

Point II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS NOT AT VARIANCE WITH ANY OF THE DECISIONS OF THIS COURT IN ANALOGOUS SITUATIONS.

In point of fact, the decision of the Circuit Court of Appeals affirming the District Court in this case is in consonance with the decisions in this Court to the effect that, where representatives of a class have intervened for the benefit of all, and have created or preserved a fund for the benefit of a class, the representatives are entitled to have their costs and fees made a charge upon the fund.

Trustees v. *Greenough*, 105 U.S. 527.
Sprague v. *Ticonic National Bank*, 307 U.S. 161.
Hobbs v. *McLean*, 117 U.S. 567.

In the *Greenough* case, this Court said at pages 532-533:

"But in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal in-

terest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust: and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings,—if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust,* and to have secured its proper application to their use. • • •

"It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts."

In the *Sprague* case, this Court said at page 166:

"Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.[5]

[5] For examples of the discretionary nature of the authority of equity to tax costs, see 3 Daniell's, Chancery Pleading and Practice (2d ed.) 1381-1410; 2 Street, Federal Equity Practice §§1994-2007."

Point III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS NOT AT VARIANCE WITH ANY OTHER DECISIONS OF ANY CIRCUIT COURTS OF APPEALS IN ANALOGOUS SITUATIONS.

As above indicated, the decision of the Circuit Court of Appeals in this case determined:

> "After reviewing the record and considering the objections made to these allowances, we are unable to say that they are excessive or unreasonable, or that the trial judge, who had intimate, personal knowledge of the services rendered, abused his discretion in making them." (R. 245.)

In addition to the authorities cited in the Circuit Court of Appeals decision, the following cases demonstrate that the various Circuit Courts of Appeals have consistently refused to review allowances where no abuse of discretion is shown.

Thus in *In re Standard Gas & Electric Co.*, 106 F. 2d, 215, the Circuit Court of Appeals for the Third Circuit stated at page 216:

> "Upon appeal from an allowance under the statute the only question before us is whether the district court abused its discretion in making the allowance * * *."

Similarly, in *In re Sovereign Corporation*, 114 F. 2d, 1013, the Circuit Court of Appeals for the Seventh Circuit stated at page 1014:

> "We also recognize in this case that our discretion should not be exercised in favor of an appeal except

where it appears there has been an abuse of discretion on the part of the lower court in determining the amount of fees allowable."

Likewise, in *Singer* v. *General Motors Corporation,* 136 F. 2d, 905, the Circuit Court of Appeals for the Second Circuit, in a stockholders' derivative suit resulting in a successful compromise for the plaintiffs, affirmed an allowance of $10,000 to one of the attorneys, stating:

"the district judge has awarded $10,000 for this service, and we cannot say that that was so little as to make its allowance an abuse of discretion."

Like determinations have been made by the Circuit Court of Appeals for the Ninth Circuit in *In re American Mail Line,* 115 F. 2d, 196, and by the Circuit Court of Appeals for the Fourth Circuit in *Milbank, Tweed & Hope* v. *McCue,* 111 F. 2d, 100. In *Newman* v. *Ambassador Apartments,* 101 F. 2d, 308 (3d Cir.), Judge Maris said:

"Upon appeal this court may not consider the allowance de novo or substitute our discretionary judgment as to their amount for that of the District Court. We are confined to the determination of the single question, whether the District Court abused its discretion in making the allowances appealed from to the extent that it can be said that it completely ignored the factors which it should have considered and reached a result in manifest disregard of right and reason."

The only objectors to the allowances herein are the petitioners, who recently acquired their stock from Hanlon,

the deposed trustee. The Securities and Exchange Commission, which is the plaintiff in this litigation and is the government agency having jurisdiction in the premises, did not object to the allowances to the respondents in the District Court, but affirmatively supported such allowances. In its brief in the Circuit Court of Appeals, the Commission stated: "We take no position on these allowances on the present appeal." Likewise the Receivers, who are the officers of the Court charged with the administration and preservation of the assets of the Trust, made no objection to the allowances to the respondents or the amount of such allowances, either in the District Court or in the Circuit Court of Appeals.

Point IV.

THE CIRCUIT COURT OF APPEALS IN THIS CASE HAS NOT DEPARTED AT ALL FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS ENTIRELY UNNECESSARY.

As above shown, the decision of the District Court, awarding an allowance to the respondents for services rendered, rested in the sound discretion of the District Court. Upon appeal the Circuit Court of Appeals affirmed, reciting the valuable services rendered by the respondents, and determined that there was no abuse of discretion by the District Court in awarding such allowance. The petition to this Court is void of any showing of abuse of discretion by the District Court. The petition seeks to have this Court fix the value of the respondents' services, in lieu of the District Court. This Court should accordingly reject such petition.

It is accordingly respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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Appendix A.

Excerpts from Stratton Complaint.

"The nature of the business of the Trust . . . consists principally of the purchase and sale for investment purposes of securities of public utilities, industrial corporations and other high-grade investments of a conservative type and character." (R. 90.)

"In or about the month of October, 1941, the respondent, Gordon B. Hanlon, by the use of the sum of less than $20,000, designed, managed and contrived to purchase and acquire the ownership of 110,000 common shares of no par value of the Trust with voting power, or approximately 64% of all of the common shares of the Trust with voting power. At the time of such acquisition, the said Trust had total assets of approximately $2,250,000 with which to meet its debenture indebtedness of $5,900,000, and the Trust was accordingly insolvent to the extent of $3,650,000. The sole purpose and the scheme of said Hanlon's acquisition of said voting control of the Trust was to obtain and have full power, control and disposition of its business, assets and affairs for his own personal benefit and enrichment. In pursuance of such voting control, said Hanlon in or about November, 1941, caused himself and the other individual respondents,

Excerpts from District Court's Findings.

"Between the years 1927 and 1943, inclusive, the Trust's investments were confined largely to the securities of well-known public utility and industrial companies, in most cases listed on securities exchanges and readily marketable." (R. 120.)

"On October 1, 1941, the defendant Gordon B. Hanlon, . . . purchased the 110,000 common shares for approximately $10,000 at a public auction conducted on behalf of the Chase National Bank as foreclosing pledgee. This block represented more than 60% of all the outstanding common shares of the Trust. At the time of Hanlon's purchase the market value of the Trust assets was substantially less than the face amount of the outstanding debentures, . . . Although the common shares now held by Hanlon had no asset value, they constituted voting control of Aldred with the attendant power to elect and remove trustees and officers, to fix the compensation of the latter, and to dominate completely the policies of the Trust. The real value in these shares lay in their control of the Trust's policy, the Trust's assets, and the ability to direct the overhead management costs. Such control was in fact exercised by Hanlon

Excerpts from Stratton Complaint.

who are his personal associates and subordinates, to be elected and designated as the trustees of the Trust, and they have since acted and served as such trustees." (R. 90-91.)

"Upon acquiring control of the Trust . . . , Gordon B. Hanlon caused himself to be elected as president of the Trust, his nominee John L. Arnold as vice-president and treasurer, and his nominee Robert P. Loring as secretary of the trust, and caused salaries to be paid to them by the Trust, principally to himself, of $9,249.99 for the year 1942 and $11,700 for the year 1943 . . . Said salaries so paid to the respondents were not at all commensurate with any services that they may have performed in behalf of the Trust and were greatly in excess of the reasonable value of any such alleged services. In addition, the said respondent Hanlon has caused the Trust to pay to the five individual respondents a total of $6,000 a year as trustees of the Trust." (R. 91.)

"Further, since acquiring control of the Trust, said respondent Hanlon has caused the Trust to pay to his firm, Gordon B. Hanlon & Co., the sum of $4,920 per annum for alleged office facilities furnished by his company to the Trust, which sum is greatly in excess of the value of any such facilities." (R. 91.)

Excerpts from District Court's Findings.

through the selection of a group of close friends to serve as trustees. At all times the Trustees have been subject to Hanlon's wishes and directions." (R. 122.)

"Late in 1941 the trustees elected the defendant, Gordon B. Hanlon, president of the Trust, the defendant Arnold, vice-president and treasurer, and the defendant, Loring, secretary. . . . During the year 1942 the officers received $9,249.99 as salaries, including $5,500 to Gordon Hanlon as president, the amount voted by the trustees. The trustees received $6,000 as compensation, this being provided for in the Trust agreement. During 1943 the trustees' fees remained the same, but the salaries of officers were increased by the trustees to $11,700, including $6,900 to Hanlon. For the first half of 1944 trustees' fees were $3,000, and salaries of officers $5,850.00. Hanlon's salary as president was in excess of the salaries paid to the presidents of the Trust in prior years." (R. 122-123.)

"The Trust was charged $410 per month by Hanlon for the use of office space and facilities which had hitherto been available to Gordon B. Hanlon & Company, plus the use of one additional adjoining room. . . . Payments by the Trust to Gordon B. Hanlon & Company for office facilities have been at the

Excerpts from Stratton Complaint.

"During the year 1942, the Trust had . . . only $169,616.71 to meet the interest for said year upon its said debentures, which interest amounted to $265,500. Accordingly, said debenture interest was to the extent of $95,883.29 paid out of the capital of the Trust. . . . During the year 1943, . . . said debenture interest was to the extent of $99,923.80 paid out of the capital of the Trust." (R. 91-92.)

"Although the Trust was hopelessly insolvent at the time of the acquisition by said respondent Hanlon of voting control thereof as aforesaid, and has continued so to be up to the date hereof, yet said respondent Hanlon, in pursuance of his purpose and scheme aforesaid and in order to keep his entrenched hold upon the assets, property and affairs of the Trust and to obtain for himself and the other individual respondents the personal benefits and enrichment hereinabove and hereinafter alleged, has continued the existence of the Trust and has continued payment of said debenture interest out of its capital, and said respondent Hanlon intends so to do, to the detriment and against the interests of the holders of said debentures." (R. 92.)

Excerpts from District Court's Findings.

yearly rate of $4,920, and up to June 30, 1944, have totaled $12,-874." (R. 123.)

"For the years 1940 to 1943, inclusive, the earnings of the Trust have been substantially insufficient to meet the interest requirements on its outstanding debentures. During this period the Trust paid out an aggregate of $1,062,945.13 as interest to the debenture holders of which $479,775.42 was derived from the sale of assets of the Trust." (R. 121.)

"When Hanlon purchased the control of the Trust the common shares had no equity position. The enterprise belonged to the debenture holders. Yet Hanlon's purchase enabled him to exercise dominion and control over the management and investment policies of the Trust. . . . Furthermore Hanlon, with the concurrence of the other defendants, has dictated policies with regard to the portfolio securities of the Trust which are contrary to the interests of the debentures from earnings the management has liquidated substantial amounts of high-grade portfolio securities to pay interest and management expenses. In reality, this is not interest to the debenture holders but is a return of the capital of the Trust in the guise of interest." (R. 132-133.)

Excerpts from Stratton Complaint.

"The assets, liabilities, capital structure and financial condition of the Trust as at the end of the years 1941, 1942 and 1943 are as set forth on the photostatic copies of balance sheets and statements of surplus and profit and loss for each of said years, annexed hereto, made a part hereof, and marked respectively Exhibits A, B and C. Since the year 1940 the Trust has sustained a loss in its operations as a result of which the capital assets of the Trust have been substantially and materially impaired, and at the present time the market value of the assets of the Trust is sufficient to pay only about 50% on the liabilities of the Trust . . ." (R. 92.)

". . . said trustees of the Trust have been using capital rather than income to pay the interest on the Trust's debenture indebtedness, and were and are thus consuming the Trust's resources and substance, and will continue so to do unless relief is granted as herein prayed." (R. 93.)

". . . Hanlon in or about the month of January, 1944, insti-

Excerpts from District Court's Findings.

"The following table indicates from 1937 to 1944, inclusive, the asset value for each $1,000 principal amount of outstanding debentures, i.e., the value of the assets that would be distributed to each $1,000 principal amount of debentures if the Trust were to be liquidated and its assets distributed to its security holders:

As of December 31	Asset value per $1,000 Debenture
1941	362.66
1942	444.32
1943	559.98"

(R. 121.)

"Yet so long as the management sells portfolio securities of the Trust and distributes the proceeds to the debenture holders as ostensible interest, no technical act of default has occurred. The debenture holders are left helpless under the terms of the debenture agreement to halt the dissipation of their assets. As long as the personal advantage of Hanlon and the other defendants stood in the way the debenture holders could not expect relief either by way of bona fide recapitalization or liquidation." (R. 133.)

"Early in December of 1943 Hanlon commenced negotiations

Excerpts from Stratton Complaint.

tuted negotiations for the acquisition of working control of Eastern Racing Association, Inc., . . . engaged in conducting a horse-racing track commonly known as Suffolk Downs, . . . intending to employ the assets of the Trust in connection with such acquisition, and for the sole purpose of electing himself president of the Racing Association and his subordinates as junior officers of such association with the large salaries, emoluments and privileges flowing to them therefrom and with control over the assets, property and affairs of said association for their own personal benefit and advantage." (R. 93.)

". . . Hanlon purported to convene an annual meeting of the shareholders of the Trust on January 24, 1944. At such meeting, dominated and controlled by said respondent Hanlon as aforesaid, owning 110,000 out of the 171,500 of common shares with voting power, he caused a resolution to be adopted purporting to give the trustees of the Trust wider authority in respect to investing the funds of the Trust." (R. 93.)

"The said resolution was illegally adopted and null and void, in that no due notice of the proposed adoption of said resolu-

Excerpts from District Court's Findings.

with C. F. Adams and V. C. Bruce Wetmore, owners of the majority of the voting stock of Eastern Racing Association which operated the Suffolk Downs horse racing track in East Boston." (R. 125.)

"On February 18 the defendants, through the Trust's control of Eastern, were elected as directors or officers of Eastern Racing Association, G. B. Hanlon, Higbee, Bowen, Hart and Loring were elected directors, and Hanlon was elected president, Arnold treasurer, and Loring, vice-president, of Eastern Racing Association." (R. 129.)

"Hanlon was attracted to Eastern Racing by the prospects of high salaries and other benefits for himself and his nominees." (R. 133.)

"On January 24, 1944, at 9 A.M. the meeting of the shareholders was held, at which 110,090 shares out of a total of 171,500 shares outstanding were represented. By a vote of 110,050 shares, of which 110,000 shares belonged to Gordon B. Hanlon, a resolution was adopted to change the investment policy as recommended by the trustees." (R. 127.)

"Instead of fulfilling this obligation to the holders of the debentures, the defendants pursued a positive program of con-

Excerpts from Stratton Complaint.

tion was given by the respondents to the shareholders of the Trust, nor did they (the defendants) disclose to the shareholders in the notice of the meeting or in advance of the meeting or at the purported meeting that the respondent Hanlon had instituted negotiations for the acquisition of Suffolk Downs and intended to utilize the purported enlargement of the powers of the trustees for the purpose of acquiring such race-track for and at the expense of the Trust." (R. 93, 94.)

"The aforesaid purported attempt of the respondent Gordon B. Hanlon (a) to alter and change the terms and provisions of the trust agreement of November 7, 1927 (b) to enlarge the powers of himself and his said nominees as Trustees of the Trust (c) to limit and reduce their duties and obligations as trustees and (d) to exculpate them from responsibility and liability thereunder was null and void . . . and in violation of the provisions of the United States Investment Company Act of 1940." (R. 94.)

"Subsequent to the purported adoption of said resolution and in or about February 1944, said respondent Hanlon, with the consent and acquiescence of the other trustees of the Trust, caused it to sell a substantial number of shares of common

Excerpts from District Court's Findings.

cealment. The intention to alter the basic investment policy of the Trust was announced to the shareholders in a masterful bit of understatement. . . . Not one ray of light as to the defendants' intentions was revealed to the debenture holders. Even the name of the Eastern Racing Association was not allowed to be entered in the trustees' minutes." (R. 134-135.)

"The concentration of so large a proportion of the Trust's assets in one investment was a radical departure from the policy of diversification which had been previously followed, and from the declarations of policy set forth in the registration statement first filed with the Securities and Exchange Commission. The same is true of the investment in another company for the purpose of exercising control or management." (R. 134.)

"To raise the cash required for the purchase of 50.3% of the voting securities of Eastern Racing Association the Trust sold between January 7 and February 7, 1944, more than 30% of the Trust's assets, including 10,000 shares of Pennsylvania

Excerpts from Stratton Complaint.

stock of Consolidated Gas Electric Light and Power Company of Baltimore and Pennsylvania Water and Power Company, which had been owned by the Trust since its inception in November 1927, and which securities were commonly accepted and regarded as high-grade securities for investment purposes . . ." (R. 94.)

". . . the proceeds thereof were caused by said respondent Hanlon to be employed in the purchase and acquisition in the name of the Trust, at inflated and excessive prices, of 10,994 shares of stock of said Eastern Racing Association, Inc." (R. 94.)

"The said Racing Association stock is not a security and its activities are not the type of enterprise in which the Trust and its trustees can properly invest the funds and assets of the Trust; in essence it represents a sporting pastime that is subject to, and based solely on, special license granted by, and subject to the will of, the people of the Commonwealth of Massachusetts by public referendum conducted once every four years." (R. 95.)

Excerpts from District Court's Findings.

Water and Power Company, 5,000 shares of Consolidated Gas Electric Light & Power Company of Baltimore, and 3,000 shares of Eastern Gas and Fuel Associates." (R. 127.)

"Large blocks of the best securities in the portfolio were thrown on the market at prices below those which probably could have been obtained through a more orderly process of disposal." (R. 133.)

"To acquire the controlling interest in Eastern Racing Association the Trust had to pay $80 per share. From November 1943 through February 1944 published bid prices for the common stock of Eastern Racing ranged between $52 and $59 per share." (R. 130.)

"The horse racing industry is considered a questionable enterprise by large segments of the public. Investment trusts of the Aldred type do not have controlling blocks of racing stocks in their portfolios. The racing business is exposed to certain disabilities not encountered by other businesses." (R. 134.)

". . . Its operation is contingent upon the securing of a license from the Massachusetts State Racing Commission. . . . Furthermore, the County of Suffolk in Massachusetts conducts a quadrennial referendum on the horse racing question." (R. 130-131.)

Excerpts from Stratton Complaint.

". . . stocks of the kind recently acquired in said Eastern Racing Association, Inc. have not heretofore been purchased or dealt in by the said Trust . . ." (R. 95.)

". . . that the purpose . . . of . . . Hanlon and his . . . associates in acquiring the stock of said Eastern Racing Association, Inc. was and is to enable them to hold high positions in said association, and to receive for their own personal benefit and use the substantial salaries which the officers of the said association, . . . have heretofore received." (R. 95-96.)

". . . the shares of said association are of such nature and character as to be outside of and beyond the scope of investments by trustees and other fiduciaries generally in the exercise of sound discretion, . . ." (R. 96.)

". . . that the individual respondents have willfully and deliberately caused gross and wanton waste in the management of the business and affairs of the Trust, that they have grossly and wantonly abused the Trust which they assumed, and the duties and obligations thereof imposed upon them by law and under the said Trust agreement." (R. 96.)

Excerpts from District Court's Findings.

"The acquisition of the control of this track, being a departure from their former investment policy, necessitated an amendment of the statement of policy with respect to investments as filed with the Securities and Exchange Commission. . . ." (R. 125.)

"In acquiring control of Eastern Racing the defendants knew that Adams and Wetmore, as president and treasurer, respectively, had each received salaries of $25,000 per year and bonuses of an additional $25,000 each." (R. 129.)

"Hanlon was attracted to Eastern Racing by the prospects of high salaries and other benefits for himself and his nominees." (R. 133.)

"The purchase of the control of Suffolk Downs took the Trust from concentration in utilities into concentration in horse racing, not merely for investment but for control." (R. 135-136.)

"(1) I find and rule that Gordon B. Hanlon, as President of the Aldred Investment Trust and, during 1943 as a trustee of the Aldred Investment Trust and continuing as such until January 17, 1944, has been guilty of a 'gross abuse of trust' within the meaning of Section 36 of the Investment Company Act of 1940.

Excerpts from Stratton Complaint.	*Excerpts from District Court's Findings.*
	"(2) I find and rule that Robert P. Loring, Elton N. Hanlon, W. Edward Higbee and Malcolm M. Bowen, who were all trustees prior to January 17, 1944, were guilty of 'gross abuses of trust' within the meaning of Section 36 of the Investment Company Act of 1940." (R. 136.)
Complaint prayed for appointment of receiver of the property and assets of the Trust for purposes of liquidation. (R. 97.)	Court appointed a receiver of the property and assets of the Trust for purposes of reorganization or liquidation. (R. 137.)
Complaint prayed that defendants be enjoined from interference with trust property and assets. (R. 97.)	Court granted prayer enjoining defendants from service or acting in capacity of trustee or officer of the Trust. (R. 137.)

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1276.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
THE ALDRED INVESTMENT TRUST ET AL.,
Defendants.

APPLICATION OF J. N. WELCH, A. B. COOK AND LOUIS BERNSTEIN FOR ALLOWANCE OF FEES.

APPLICATION OF GEORGE B. ROWLINGS FOR ALLOWANCE OF FEES.

FRANK BAILEY ET AL.,
Intervenors-Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT ROWLINGS IN OPPOSITION.

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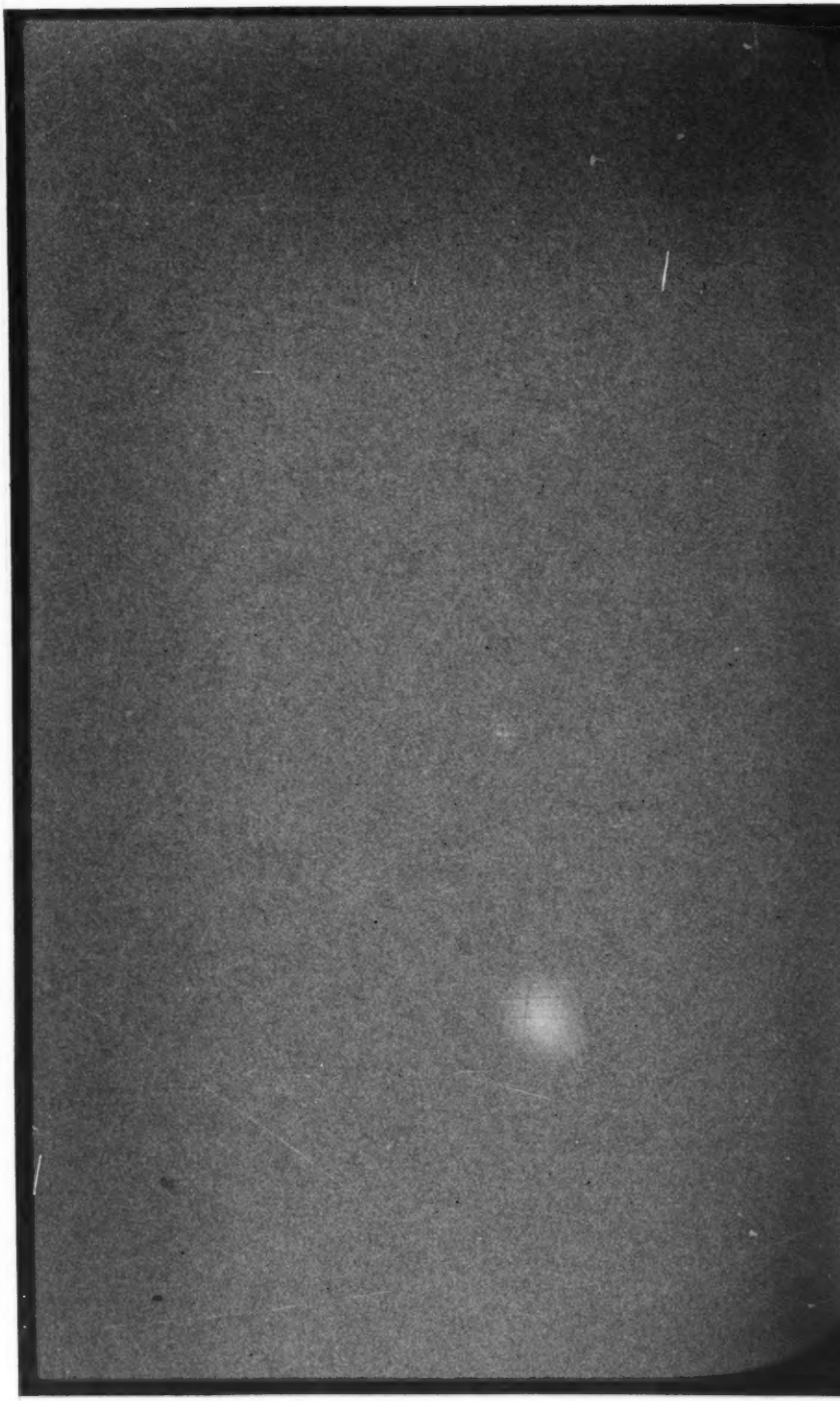

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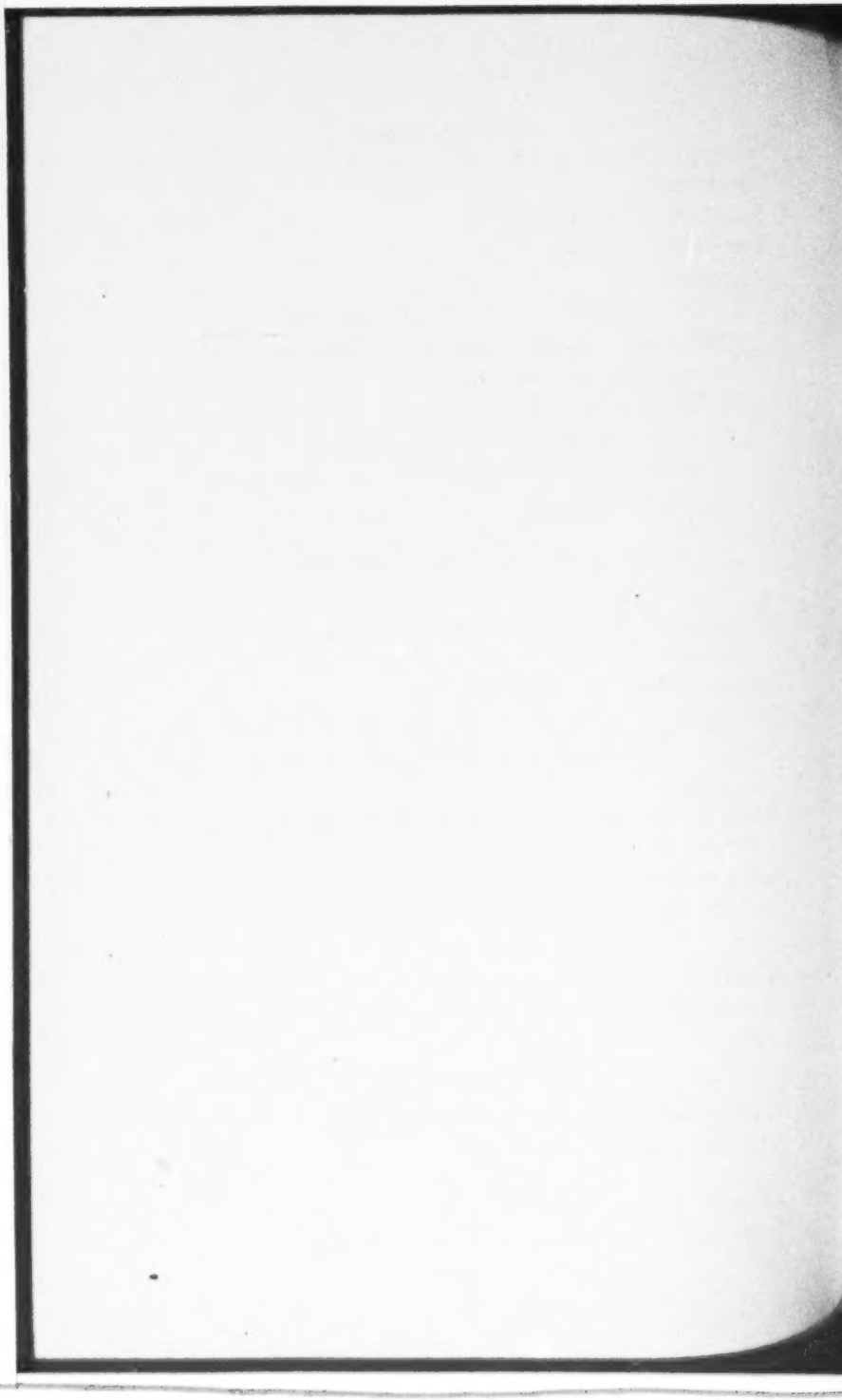

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Opinions Below.

There is no opinion of the District Court for the District of Massachusetts. The opinion of the Circuit Court of Appeals, entered February 24, 1947 (R. 242), is reported in 159 F. (2d) 1014. The petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code.

Question Presented.

The question presented is whether this respondent was properly allowed the sum of $14,000 as compensation for his services as attorney for the Receivers of Fidelity Assurance Association, Intervenors, in the action entitled "*Stratton* v. *Aldred Investment Trust,*" and in the case at bar.

Statement of Facts.

The statement of facts, as set out in the petition, is fragmentary and for that reason misleading. A further and more detailed statement is therefore necessary to a proper understanding of the case. The pertinent facts may be briefly summarized as follows:

The Aldred Investment Trust was a common-law trust organized in 1927 under an agreement and declaration vesting absolute control of the Trust and its assets in its trustees and their successors.

At the time of the litigation hereinafter described the Trust had outstanding in the hands of the public $5,900,000 face amount of debentures, which bore interest at the rate of four and one-half per cent (4½%) per annum, but which did not mature until December 1, 1967. To each

debenture was attached 1 common share (no par value) of the Trust for each $100 principal amount of debenture. The total outstanding amount of such non-detachable shares, therefore, was 59,000. The Trust also had outstanding 112,500 free common shares not attached to any debentures. All common shares, whether attached or free, had equal voting rights share for share (R. 119-120).

In October, 1941, one Hanlon acquired 110,000 of the free common shares of the Trust. This block represented more than sixty per cent (60%) of all the outstanding shares, and although it had no asset value, it constituted voting control of the Trust and gave Hanlon the power to dominate completely the Trust's policy, assets and management. This control he exercised by selecting a group of intimate friends to serve as trustees, who were subject to his wishes and directions, and by managing the assets of the Trust in a manner adverse to the interests of the debenture holders and tending toward dissipation of such assets (R. 122 *et seq.*).

The Receivers of Fidelity Assurance Association, as the holders of $195,000 face amount of said debentures and 1950 attached shares, disturbed by the situation of the Trust, caused an investigation to be made regarding the Trust. Their attorneys in West Virginia, Messrs. Koontz & Koontz, and in New York, Messrs. Swiger, Chambers and Kelley (whose services and disbursements this respondent requested be recognized in the allowance to him (R. 75-76)), made investigations, as a result of which they consulted with the respondent Rowlings with reference to the Receivers' rights as debenture holders to obtain receivership and liquidation of the Trust. Mr. Rowlings conferred with them and rendered an opinion in this respect, following which he prepared to file a complaint for the appointment of receivers. While this was in prepara-

tion he learned that attorneys for one Stratton were about to file a similar petition and he thereupon conferred with them. It was decided that he would work in collaboration with these attorneys in instituting and prosecuting these proceedings, the Fidelity Receivers to come in as intervening parties plaintiff rather than join in the original petition (R. 76).

On March 8, 1944, the Stratton suit was commenced by a complaint praying for the appointment of a receiver to take control of, protect and liquidate the assets of the Trust and distribute the proceeds among its debenture holders and stockholders and that Hanlon and his associates be restrained from managing or directing the business and affairs of the Trust (R. 97, 149).

Mr. Rowlings assisted and participated with the Stratton attorneys in the preparation of this complaint, its filing, issuance of subpoenas in connection therewith and the preliminary hearings relating to the issue as to jurisdiction raised by the defendants (R. 76). On March 15, 1944, he filed a motion on behalf of the Fidelity Receivers to intervene as parties plaintiff (R. 149, 182). After a hearing this motion was denied without prejudice for the sole reason that in the opinion of the District Judge the intervention at that time might complicate the question then pending as to the Court's jurisdiction over the original parties to the action (R. 149, 229). After the Court's decision on the jurisdictional question (R. 150) Mr. Rowlings, on May 16, 1944, again filed a motion for the intervention of the Fidelity Receivers as parties plaintiff (R. 150, 186) and this motion was allowed after hearing on May 24, 1944 (R. 150, 151, 237).

On May 19, 1944, the Securities and Exchange Commission filed a complaint in said District Court against the Aldred Investment Trust and Hanlon and his associates under the Investment Company Act of 1940 for the same

relief prayed for in the Stratton case (R. 2, 11, 118, 152). This case will be hereinafter referred to as the S.E.C. case. While the S.E.C. case was pending the Stratton case was tried on the merits (R. 151, *120-417**) and was taken under advisement on June 20, 1944, and decision on the merits was withheld pending the hearing of the S.E.C. case (R. 118, 151). In the preparation for the trial of the Stratton case (which preparation included the taking of lengthy depositions of many of the defendants) Mr. Rowlings actively assisted the attorneys for Stratton (R. 76-77). In the trial of the Stratton case he also participated, and Mr. Palmer, of the firm of Koontz & Koontz, through whom the case came to Mr. Rowlings, took part in the presentation of evidence (R. *121, 186* to *187, 193* to *197, 200* to *201, 209* to *210, 332* to *334, 389* to *391, 415, 416*).

Early in January, 1945, the S.E.C. case was tried on the merits. At the very outset of that trial counsel presented to the Court a stipulation whereby the entire "transcripts of testimony and depositions taken and the exhibits received in evidence" in the Stratton case were "incorporated" in the S.E.C. case and "added to the testimony presented in the trial of this cause" and further stating that the Stratton record should "be considered as if adduced in this Action" (R. 118, *637-638*).

On January 19, 1945, the District Court rendered its opinion and entered judgment in the S.E.C. case adjudging the officers and trustees of the Trust guilty of misman-

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*Italicized record references are page numbers of the printed record of the S.E.C. case on the first appeal to the Circuit Court of Appeals. Copies of such record may be found with the petition for certiorari filed with this Court under Docket No. 645, October Term, 1945, which petition was denied. Such printed record is properly a part of the record for this petition because it was by stipulation transmitted to the Circuit Court of Appeals in lieu of reproduction thereof as part of printed record on appeal from the allowances here involved (R. 175, 239).

agement and gross abuse of trust, enjoining them from acting as such trustees and officers and appointing receivers for the Trust (R. 118, 151, 156, *96*). In the same opinion the Court stated (R. 137):

> "Civil Action No. 2708; In view of the fact that the relief prayed for in this, the Stratton case, has been fully granted in the S. E. C. case, it seems unnecessary to pass upon the merits of the Stratton case. The bill is therefore ordered dismissed without prejudice and without costs."

The defendants in the S.E.C. case appealed from the judgment of the District Court to the Circuit Court of Appeals for the First Circuit (R. 156, *1085*) and that Court affirmed the judgment (R. 158). Respondent Rowlings, together with the Stratton attorneys, with the permission of the Circuit Court of Appeals, prepared and filed in connection with said appeal a brief as *amici curiae*.* On March 4, 1946, Mr. Rowlings filed a petition in the District Court on behalf of the Fidelity Receivers to intervene in the S.E.C. case (R. 159, 220). This was allowed on May 6, 1946 (R. 221). On March 4, 1946, he filed his petition for allowance of compensation in the S.E.C. case (R. 221). This was heard by the District Court on May 8, 1946 (R. 64 *et seq.*) and an order making an allowance of $14,000 to Mr. Rowlings for services and disbursements was entered May 9, 1946 (R. 223). This order was affirmed by the Circuit Court of Appeals for the First Circuit on February 24, 1947 (R. 242).

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*Copies of this brief were also transmitted by stipulation to the Circuit Court of Appeals as part of the record on appeal from the allowances here involved (R. 68, 176).

Argument.

I.

The Decision of the Circuit Court of Appeals Affirming the Allowance of $14,000 to Respondent Rowlings was Correct.

The governing principle under which Mr. Rowlings was awarded and is entitled to an allowance for services and disbursements in the receivership of Aldred Investment Trust is well established. The leading case in which the principle is stated is *Trustees* v. *Greenough*, 105 U.S. 527, 532-533, where it is stated:

> "It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts."

There can be no doubt that the efforts of Mr. Rowlings and the other counsel for the Fidelity Receivers contributed substantially to the preserving and protecting of the trust estate. This is evident from a consideration of the facts appearing in the record and heretofore briefly recited.

Regardless of whether the Securities and Exchange Commission made its own investigation or whether in the opinion of its attorneys the preparatory work in the Stratton case was of no assistance to them, the fact remains that the Commission accepted as part of its case the rec-

ord in the Stratton case, which action necessarily also accepted the benefit of all investigation, preparation and effort which had gone into producing the Stratton record. It must be presumed that in the judgment of the Commission's attorneys this record furnished them with indispensable evidence for their case. A comparison of the evidence adduced in the Stratton case and in the S.E.C. case with the findings of the District Court will show that many of such findings must have been based on Stratton evidence only and many more on evidence introduced in both cases. The important fact is that the work of the attorneys in the Stratton case and the evidence produced by them not only was incorporated as part of the S.E.C. case but obviously formed a very material element in producing the final result therein.

Although the Stratton case was technically "dismissed," the judge deemed it "unnecessary to pass upon the merits of the Stratton case," because, as he stated, "the relief prayed for in this, the Stratton case, has been fully granted in the S.E.C. case" (R. 137). Thus the Stratton case was not dismissed because the evidence it produced did not justify the relief asked. Nor does such dismissal "without prejudice" indicate that the attorneys for the original and intervening plaintiffs did not contribute substantially to the relief afforded the debenture holders by the result in the S.E.C. case. That the District Judge considered their work of assistance to him in granting the relief prayed for is shown by his memorandum endorsed on a letter to him from one of the Stratton attorneys. The letter (R. 196) expressed the fear of the attorney that the dismissal might be misinterpreted to foreclose allowances to him "and those associated with me in the Stratton case," and he suggested an amendment to the Stratton order to take care of this possibility. The Judge's memorandum states (R. 197):

"I deem it unnecessary to amend opinion. Stratton evidence was incorporated into SEC case and as such I would assume that petitioners may seek allowances for work in Stratton case."

Recognition of the services of Mr. Rowlings and the other attorneys for the Fidelity Receivers should not be refused by reason of the fact that the original suit was not commenced by them, or that the larger portion of the work in prosecuting it was performed by the attorneys for the original plaintiff. They worked with the Stratton attorneys from the very outset and there are no cases which hold that two or more attorneys representing similar interests when working jointly to produce the same result may not be compensated in equity from a fund created, preserved or protected through their joint efforts, even though it may be that the same result might have been obtained through the independent efforts of any one of them. In fact, the authorities are to the contrary. For example, see *Murphy* v. *North American Light & Power Co.* (D.C. S.D. N.Y., June 14, 1940), 33 F. Supp. 567; *Winkelman* v. *General Motors Corporation* (D.C. S.D. N.Y., December 10, 1942), 48 F. Supp. 504; *Crump* v. *Ramish* (C.C.A. 9, November 16, 1936), 86 F. (2d) 362.

It is well settled that in cases of this kind the allowance of attorneys' fees is within the judicial discretion of the trial judge and that in fixing the fee the Court can proceed upon its own knowledge of the efforts expended and the value of the services rendered. *Monaghan* v. *Hill* (C.C.A. 9, January 21, 1944), 140 F. (2d) 31, 34; *United States* v. *Anglin & Stevenson* (C.C.A. 10, October 6, 1944), 145 F. (2d) 622, 630; *Cleveland* v. *Second National Bank & Trust Co.* (C.C.A. 6, May 22, 1945), 149 F. (2d) 466, 470, 471. It

is perfectly clear that it is competent for the judge who presides over the litigation to make allowances to counsel based upon the record of the proceedings, statements of counsel and his own knowledge of the extent of the services rendered. *Sagalyn* v. *Meekins, Packard & Wheat Inc.*, 290 Mass. 434, 440, 441 (1935); *Winkelman* v. *General Motors Corporation* (D.C. S.D. N.Y., December 10, 1942), 48 F. Supp. 504, 507; *City of Wewoka, Okl.*, v. *Banker* (C.C.A. 10, February 5, 1941), 117 F. (2d) 839, 844, 845.

The District Judge who made the allowance to Mr. Rowlings heard the statements of counsel (R. 65 *et seq.*) and no objection was voiced by the petitioners' counsel to this procedure. The same judge had presided at the lengthy hearing of the merits of the Stratton case (R. *120* to *417*), he had before him the extensive depositions taken in the Stratton case (R. *417* to *590*), he heard the motions to intervene on behalf of the Fidelity Receivers (as to which briefs were filed (R. 226 and 230)), and he had presented to him the brief *amici curiae* which respondent Rowlings and the attorneys for Stratton filed with the Circuit Court of Appeals in the appeal from the District Judge's decision (R. 68). He obviously drew to a large extent upon his own personal knowledge of the services of counsel to whom he allowed compensation (R. 88).

As was said in *Trustees* v. *Greenough*, 105 U.S. 527, 537:

> "The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. It is not shown in this case by the appellants that any of these allowances are excessive, or that the expenditures allowed were not fairly and honestly made."

There is nothing in the record of this case to show that the allowances were excessive or that the District Judge abused his discretion in the slightest degree.

The responsibility for seeing that any record contains sufficient evidence to permit a review thereof by an Appellate Court is always on the party appealing. The statement made to the District Court on behalf of the petitioners in opposition to the allowances (R. 85) contains no objection to the manner in which the petitions for allowances were heard nor any request that sworn testimony, affidavits or other evidence be produced. In any case, the record on appeal to the Circuit Court of Appeals does show in considerable detail what the services were for which the allowances were made. For instance, that record included the entire transcript of the proceedings at the trial of the Stratton case and also the brief for *amici curiae* filed by the respondents with the Circuit Court of Appeals at the time of the appeal from the District Court's judgment in the S.E.C. case (see R. 175, 239), although the petitioners apparently did not transmit these documents to this Court as part of their record in this case.

II.

The Decision of the Circuit Court of Appeals is Not in Conflict with Any Decision of Another Circuit Court of Appeals or with Any Decision of This Court.

Although the petitioners set forth five reasons relied on for allowance of the writ, the only one they mention which is covered by Rule 38, 5(b), of this Court, indicating the character of reasons which will be considered for granting such writ, is that the Circuit Court of Appeals "reached a conclusion in conflict with decisions of this Court and of other Circuit Courts" (Petitioners' Brief, 4, par. 4). No

other reason given presents any ground for allowance of the writ. On the other hand, all the other reasons set forth merely describe the alleged particulars wherein the petitioners believe the decision of the Circuit Court of Appeals to be erroneous which falls far short of presenting any ground for the allowance of writ of certiorari.

Furthermore, the petitioners give only lip service to their allegation that the Circuit Court of Appeals reached a conclusion in conflict with decisions of this Court and of other Circuit Courts of Appeals. Nowhere in their brief do they name even one decision which supports this allegation or make even an attempt to explain wherein any conflict exists. Their brief is nothing more than a re-argument of the views they presented to the Circuit Court of Appeals and which they would like this Court to hear again.

It would seem that the petitioners have failed to observe that Rule 38, 5, of this Court explicitly states:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

It is respectfully submitted that no such reasons exist in the case at bar.

Respectfully submitted,

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TYLER & REYNOLDS,

Of Counsel.